United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH SPIESS,

Appellant,

vs.

PACIFIC MARINE IRON WORKS, a Corporation; GEORGE H. STURGES and ROBERT B. STURGES, co-partners, doing business under the firm name and style of Sturges & Sturges, and SOMMARSTROM SHIPBUILDING COMPANY, a Corporation,

Appellee,

APPELLANT'S BRIEF

WM. P. LORD, .. Proctor for Libellant.

CAREY & KERR and CHARLES A. HART,
Proctors for Appellee,
Sommarstrom Shipbuilding Co.

THE ARGUS PRESS AND MAIL ADVERTISING CO., INC.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH SPIESS,

Appellant,

vs.

PACIFIC MARINE IRON WORKS, a Corporation; GEORGE H. STURGES and ROBERT B. STURGES, co-partners, doing business under the firm name and style of Sturges & Sturges, and SOMMARSTROM SHIPBUILDING COMPANY, a Corporation,

Appellee,

APPELLANT'S BRIEF

STATEMENT

This appeal is brought to review an order of the District Court sustaining exceptions to the libel made by one of the respondents and a decree entered thereon dismissing the libel as to this respondent.

The libel alleges a maritime tort against three respondents for personal injuries sustained by libellant on April 29, 1919, while the libellant was walking across a plank from the deck of the SS. "Datis" to a wharf, by the giving way and falling of the plank, causing libellant to be thrown into the water and onto

the plank, and resulting in the breaking of his right leg. The plank was designed as a gang plank.

It appears in the libel that the SS. "Datis" was launched in the Columbia River on the 21st day of June, 1918, at Columbia City, Oregon. The ship had been constructed by the Sommarstrom Shipbuilding Company, a Washington corporation, at its shipyard in Columbia City, Oregon, and on the 29th day of June, 1918, had been launched and christened, and had been brought to Portland, Oregon, and on the 29th day of April, 1919, "the engines in said steamship had been installed and the said steamship was lying in the navigable waters of the Willamette River, within the Port of Portland, Oregon, and was berthed at the dock of the respondent, Pacific Marine Iron Works, and on said day was being prepared and made ready for an ocean voyage, and during all the times herein mentioned, was under the control of the respondents." It is alleged that the Pacific Marine Iron Works is a corporation transacting business in Portland, Oregon and engaged in the business of fitting out ocean-going ships, and in the sixth paragraph of the libel it is alleged that prior to the injuries received by libellant, the Shipbuilding Company and the Marine Iron Works had entered into a contract for fitting out and making said steamship ready for an ocean voyage, and in performance of the contract the Pacific Marine Iron Works had sublet a portion of the fitting out and plumbing of the vessel to the respondent Sturges & Sturges.

The plaintiff was employed by Sturges & Sturges and on the 29th day of April, 1919 was placing lead pipe for plumbing fixtures in said steamship under the immediate direction and control of Sturges & Sturges and the other respondents.

In the fifth paragraph it is alleged that the means of communication provided by respondents for their employees working on the steamship to the dock on the port side was by a board or plank three by twelve, and about fourteen feet in length placed from the main deck to the wharf and the distance between the steamship and the dock was eight feet, and the distance to the water in which the vessel was lying was about thirty feet below and at the time libellant received the injuries that the deck was about four feet higher than the floor of the wharf on which one end of the plank was resting, "and the said plank was used by respondents and their employes, and other persons having business on said steamship, as a means of ingress and egress to and from said steamship, to the dock or wharf aforesaid."

The negligence charged against the respondent was that the plank from the deck to the wharf was not fastened, lashed or cleated down by any means to the deck of the steamship, which was unknown to the libellant; that unless such plank is fastened, lashed or cleated there is great danger from the rise and fall of the waters in the Willamette River, or by the population of waters of the river against the steamship by other craft using the

river, that the ends of the plank will move or slip and would no longer act as a support adequate to sustain the weight of a person using the same, and that the safe and proper method in fixing the gang plank so that it would have been safe to use as a means of ingress and egress, was to have lashed the gang plank with rope from the inboard side of the plank to ring-bolts or deck-bits on the innboard side of the steamship or to have placed cleats under the gang plank, all of which was a failure of all the respondents to provide libellant with a safe place to work, and safe ingress and egress from the ship to the wharf.

It is then alleged that while libellant was engaged in his duties he was required to go from the steamship to the wharf on business and while he was using the plank as a means of reaching the wharf, and having just stepped onto the plank from the deck of the steamship through the fault of respondents in failing to fasten, lash or cleat the plank so that it would remain stationary, the end of the plank resting on the vessel gave way and fell into the waters below precipitating libellant into the waters and striking his right leg on the plank when he struck the water.

Libellant's right leg was broken, which required an operation and to be set with a silver plate. Loss of nine months' time, to his damage in the sum of $1,750; doctor and hospital bills in the sum of $609 incurred; permanent impairment to the right leg and pain and suffering

sustained, are alleged to his damage in the sum of $10,000.

On the 31st of March, 1920, on stipulation of respective counsel for Sturges & Sturges and the Pacific Marine Iron Works, the libel was dismissed as to these respondents with prejudice.

The Sommarstrom Shipbuilding Company filed exceptions on the grounds that the place where libellant received his injuries was a long distance from the shipbuilding plant of the company, at the dock of the Iron Works and that the work in which the libellant was engaged did not require the use of machinery, appliances or place of employment furnished by the shipbuilding company and that it was under no obligation in regard to the place of work or machinery.

Exceptions were further made on the ground that the shipbuilding company owed no duty to the libellant with respect to the safety of the plank furnished to and from the steamship for the purpose of ingress or egress while at the dock.

The District Court sustained this exception in an oral opinion and respondent, refusing to plead further, a decree was entered dismissing the libel as to the said respondent. The Court in its opinion held that there was no contractural relation between libellant and the

shipbuilding company and therefore, recovery could not be had against the shipbuilding company.

POINTS AND AUTHORITIES.

I.

The facts aver a maritime tort of which courts of admiralty have jurisdiction.

Hokkai Maru, 260 Fed. 569;
White v. John W. Cowper Co., 260 Fed. 350;
The Montrose, 178 Fed. 495.

II.

While the libellant was in the employ of one of the respondents, he was subject to the control and supervision of the other respondents. He was upon the vessel and using the plank at the invitation of the vessel and those having control over her, and it was the duty of the vessel and those having control over her, to see that the libellant had a reasonably safe place in which to perform his work and for failure of their duty in this respect, the vessel and her owners are liable.

Consolidated C. Co. v. Conley, 250 Fed. 679, and authorities.
Maryland Dredging, Etc., Co. v. Maryland, 262 Fed. 11.
The Omusk, 266 Fed. 200.

ASSIGNMENTS OF ERROR.

Now comes the libellant, Joseph Spiess, and assigns errors in the decision of the District Court, as follows:

1. The District Court erred in making an order sustaining the exceptions of Sommarstrom Shipbuilding Company, a corporation, to the libel in this cause.

2. The District Court erred in holding and deciding that the libel of the libellant did not state facts sufficient to constitute a cause of suit against the respondent, Sommarstrom Shipbuilding Company, a corporation.

3. The District Court erred in rendering a decree dismissing libellant's cause of suit and entering judgment against libellant.

WHEREFORE, libellant prays that the decree in this cause may be reversed and that he may be permitted to amend his pleadings, and that this Court may cause this suit to be brought to issue and the cause tried by order of this Court and enter final decree herein in accordance with the Statutes of the United States of America and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, as in such cases made and provided, and after taking the testimony of the witnesses for the respective parties, if the same should be proper and requisite.

ARGUMENT.

The exceptions made by the respondent, Sommar-

strom Shipbuilding Company, do not claim that the injuries complained of are not within the admiralty jurisdiction of the federal court, nor, in view of the decisions of this court in re Swayne & Hoyt v. Barsch, cited, and the more recent decision in "The Hokkai Maru," could it be successfully contended on the facts set forth in the libel that there was not a breach of duty by the negligence of some one constituting a maritime tort of which the federal courts have jurisdiction.

The only questions then for decision on review are whether the District Court erred in sustaining the exceptions of the respondent, Sommarstrom Shipbuilding Company, to the libel on the grounds that the work in which libellant was engaged did not require the use of any appliances used by this respondent, and it was under no obligation of any kind with regard to the appliances or place of work, and that it owed no duty to libellant with respect to the safety of the plank as a means of ingress from the ship to the dock, and, upon libellant's refusal to plead further, to enter an order dismissing the libel as to this respondent. Under the allegations of the libel it will be seen that the ship had been launched at Columbia City, some distance below the City of Portland in the Columbia river, and had been brought to the City of Portland and moored to the dock of the Pacific Marine Iron Works and lying in the navigable waters of the Columbia river. The Shipbuilding Company had contracted with the respondent, Pacific Marine Iron Works to fit out the ship for an ocean voyage, and

in performance of this contract, the Pacific Marine Iron Works had sub-let a portion of the plumbing to the firm of Sturges & Sturges.

The libellant was in the employ of this latter firm, but it is directly alleged that his work was under the control and direction of all of the respondents. While he was walking across a plank which was the means of ingress and egress from the deck of the ship to the dock, the plank, which was designed as a gang plank, fell, through the failure to properly lash or fasten it, and caused libellant to fall into the waters and on the gang plank, breaking his leg, etc. Paragraph V charges that the means of communication provided by respondent for their employes working on the vessel was by this board plank, specifically describing the plank, and the distance between the ship and the wharf and distance to the waters below. It is further alleged in this paragraph that the plank was used by all of the respondents and their employes and other persons having business on said steamship, as a means of ingress and egress from the ship to the dock. It is also alleged that the ship on the day of the accident was under the control of the respondents. These are clearly allegations of fact and not conclusions. It is tantamount to saying that the entire work of fitting out the vessel was under the charge of the other respondents and that libellant's work was under their supervision, as much as under the supervision of his immediate employer.

We contend that the facts averred in the libel charge a joint and several maritime tort against all of the respondents named, and all should be held jointly and severally liable for the injuries received. The libellant was on the steamship at the invitation of all of the respondents, and particularly at the invitation of the Sommarstrom Shipbuilding Company. He was not at the plant of his employer which was in another part of the city. The ship as an entity and those having control over her were advised of this fact, as well as that the plumbing on board the vessel and the work which libellant was directed to do would require him to use the gang plank to get on and off the ship. In the very nature of things Sturges & Sturges would not furnish a gang plank to get on and off the ship. It was clearly the duty of the ship and those having control over her to furnish a gang plank and further an adequate and safe gang plank as a means of ingress and egress from the ship to the wharf. A proper gang plank is essentially a part of the ship's apparel and the ship and those operating her were under a legal duty and obligation to provide proper appliances as a means to get off and on the ship and to keep and maintain such apparel in reasonably safe condition for the use of persons who were lawfully upon the ship, whether in the ship's employ, or not. This was a duty the ship and those operating her owed to everybody. The ship and its owners were chargeable with knowledge that any person at work on the ship, or who had occasion to go on the ship would be required to use the gang plank

in question. From this knowledge of the situation, a legal duty was imposed upon the ship and those having control over her towards one so exposed upon its invitation, to use at least ordinary care to protect him from harm.

There is abundant authority under the facts pleading for holding the vessel or those having control over her liable for the injuries sustained. In Consolidated Coastwise Co. v. Conley, cited, a longshoreman in the employ of a stevedoring company who had a contract for discharging a barge's cargo and who was an independent contractor, fell through a hatch and was injured, and brought a libel in personam against the owners of the barge, and the owners were held liable. The Court of Appeals for the First Circuit said, "The libellant was not in the employ of the barge, but of an independent contractor with whom the owner had contracted for her discharge. The libellant, therefore, was upon the barge at the invitation of the owner (citing authorities), and it was its duty through its representatives to see that the barge in so far as it knew or had reason to anticipate that she would be used by libellant in going to and from his work and while at work, was reasonably safe." Thereupon the court discussed the evidence, and held that the owners were negligent in leaving the hatch covers as it did.

In "The Omusk," the vessel was moored to a wharf where she had been under repair by a shipbuilding com-

pany. This work had been completed, and the workmen of the shipbuilding company under the direction of one of its employes, were about to take out a bulk-head used in repairing. At this time the U. S. Shipping Company was discharging its cargo of cotton. To get to the place of work it was necessary to go through an opening on the upper deck down a temporary stairway to the lower deck. On this deck, very near the place of work, was an open hatch. The place was usually well lighted, but when the workmen were directed to go down, the lights were out. This libellant was one of the workmen directed to descend and engage in removing the bulkheads. While waiting at the foot of the stairs for other workmen, he moved a few steps, fell through the open hatch, invisible to him, and was severely injured. The alleged negligence on which recovery was sought was failure to have the place of work lighted and leaving open and unguarded the hatch through which he fell. The District Court held the ship alone negligent and liable. The ship appealed and alleged that if there was any negligence the shipbuilding company alone was negligent and liable. The libellant assigned error that the trial court did not hold the shipbuilding company negligent and liable. The ship was acquitted of negligence in failure to light the ship, but was held negligent in failure to guard the open hatch. The shipbuilding company was held liable for directing its employees to proceed with the work in the darkness where there was an open hatch. The ship undertook to relieve itself from

liability through the fact that it had given complete charge of the hatch to the shipbuilding company who was engaged in removing the cargo of cotton and that the employees of this company had left the hatches open. It was held that the ship could not relieve itself of liability by delegating its duty to another.

The Court of Appeals said:

> "The ship undertakes to discharge itself of the duty to keep the hatch protected by saying that it had given complete charge of the hatches to the shipping company, which was unloading the cotton, and that its employers had left the hatches open. This defense is unavailing. When the ship contracted with the shipbuilding company for the repairs, it assumed the obligation to keep all the parts of the ship under its control reasonably safe for the employees of the shipbuilding company. It could not relieve itself of the duty by delegating it to the shipbuilding company (citing authorities). * * * *
>
> "We find that the proximate causes of the accident were the negligence of the shipbuilding company, in not furnishing its employees a safe place to work, and the negligence of the ship in not having the hatch guarded as its duty to the shipbuilding company and its employees required."

Consequently, both the ship and the shipbuilding company were held liable and the decree was modified to this extent.

In the light of these guiding precedents, we submit, sufficient facts are alleged in the libel to charge the respondent shipbuilding company with a responsibility for the injuries which libellant received and the decree of the District Court should be vacated and the testimony taken before a special master appointed by this court and a final decree entered in this court on the testimony adduced.

Respectfully submitted,

WM. P. LORD.

INDEX

TABLE OF CASES